STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON BROWN,

Defendant-Appellant.

UNPUBLISHED
February 11, 2003

No. 236317
Wayne Circuit Court
LC No. 99-001485-01

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carjacking, MCL 750.529a, and aiding and abetting an armed robbery, MCL 750.529, under an aiding and abetting theory. These convictions stem from an incident in which defendant assisted an unidentified man, who was carrying a gun, to commit a carjacking at a gas station in Detroit. The trial court sentenced defendant to concurrent terms of 130 months to eighteen years' imprisonment for the convictions. Defendant appeals as of right. We affirm defendant's convictions, but remand for further factfinding in regard to the scoring of the sentencing guidelines.

I. Sufficiency of the Evidence

Defendant argues that the prosecution failed to present sufficient evidence to convict him of aiding and abetting the carjacking and armed robbery. In response, the prosecution contends that the law of the case doctrine precludes this Court from ruling on this issue. Whether law of the case applies is a question of law that is reviewed de novo. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). "Under the law of the case doctrine, an appellate court's determination of law will not be differently decided on a subsequent appeal in the same case if the facts remain materially the same." *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996). We conclude that the law of the case doctrine is inapplicable in this case.

This is the second time this case has been before this Court. In *People v Jones*, unpublished opinion per curiam of the Court of Appeals, issued 10/31/00 (Docket No. 219896), this Court concluded that the magistrate did not abuse its discretion in finding that the evidence presented at the preliminary examination was sufficient to find that there was probable cause that defendant had committed the crimes and that he should be bound over for trial. "A defendant must be bound over for trial if, at the conclusion of the preliminary examination, probable cause exists to believe that the defendant committed the crime." *People v Abraham*, 234 Mich App

640, 655; 559 NW2d 736 (1999). At a trial, on the other hand, the prosecution has the burden to prove the defendant's guilt beyond a reasonable doubt. *Sullivan v Louisiana*, 508 US 275, 279; 113 S Ct 2078; 124 L Ed 2d 182 (1993), on remand 623 So2d 1315 (La, 1993); *People v Allen*, 466 Mich 86, 90; 643 NW2d 227 (2002). Because the burden of proof in a preliminary examination is substantially different than the burden of proof at trial, the issue in this appeal is clearly different than the issue in the previous appeal. Therefore, the law of the case doctrine does not preclude our review of this issue.

Turning to the merits of defendant's argument, we conclude that there is sufficient evidence to convict defendant. In reviewing a claim of insufficient evidence, this Court must determine whether, taking the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the defendant guilty beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). To establish that the defendant aided and abetted a crime, the prosecution must show that:

> (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. An aider and abettor's state of mind may be inferred from all the facts and circumstances. Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. [*People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999), quoting *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995), overruled in part by *People v Mass*, 464 Mich 615, 627-628; 628 NW2d 540 (2001).]

Defendant does not dispute that the principal committed the crimes charged. However, defendant argues that he was merely a witness to the carjacking and there was no proof that he shared the carjacker's intent or assisted in the crime. We disagree. Although there was no direct evidence that defendant shared the carjacker's intent, intent can be inferred from circumstantial evidence and reasonable inferences therefrom. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

The evidence shows that at the time the carjacking was committed, defendant was in his car, which was positioned near an exit of the gas station. Defendant kept the engine running and, although he was parked at a gas pump, he did not pump any gas. Defendant had his window down despite the fact that it was snowing. The carjacker came out of the gas station and got into defendant's car. The carjacker then got out of defendant's car carrying a gun and told the victims to shut the hood of their car and get away from their car. The carjacker pushed one of the victims and, when the victim ran, the carjacker fired his gun at him. At this point, defendant did not leave, but instead waited for the carjacker to get into the victims' car and drive away. Defendant then tried to drive away quickly, but his tires spun on the snow. The victims caught up to defendant's car, attacked defendant, and took his car. The victims pulled defendant out of his car and drove it to the police station. Although defendant claimed that he had merely given the carjacker a ride and that the victims had actually carjacked *him*, defendant never reported to the police that his car had been stolen. We conclude from this circumstantial evidence that a rational jury could find that defendant knowingly assisted the carjacker in committing the

offenses and that defendant was guilty beyond a reasonable doubt of aiding and abetting the offenses.

II. Judicial Misconduct

Defendant next argues that he was denied a fair trial because the trial court departed from its role of neutrality, denigrated defense counsel, and rehabilitated an impeached prosecution witness during its questioning of one of the witnesses. Because defendant did not object to the court's questions and comments at trial, this issue is not preserved for appeal. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). This Court reviews defendant's unpreserved claim for clear error affecting substantial rights. *Carines, supra* at 774.

A defendant in a criminal trial is entitled to a neutral and detached magistrate of justice. *People v Conyers*, 194 Mich App 395, 398; 487 NW2d 787 (1992). The trial court may question witnesses in order to clarify testimony or elicit additional relevant information. MRE 614(b); *Conyers, supra* at 404. However, the trial court must ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial. *Id.* at 405. The test is whether the trial court's questions and comments may have unjustifiably aroused the jury's suspicion in regard to the witness' credibility and whether partiality quite possibly could have influenced the jury against defendant's case. *Id.* Generally, the trial court's critical, disapproving, or even hostile remarks toward counsel, the parties, or their cases do not support a challenge for partiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996).

In the present case, the trial court's allegedly improper comments and questions followed a witness' testimony that he had never seen defendant outside of his car, despite the fact that the witness had appeared to testify otherwise at the preliminary examination. During direct and cross examination of this witness, the witness admitted that he used the word "defendant" when referring to both defendant and the carjacker. In order to clarify the witness' preliminary examination and trial testimony, the trial court asked the witness who he was referring to when he used the word "he" at trial and at the preliminary examination. Considered in context, it is apparent that the trial court's comments were designed to put the witness at ease and help clarify who he was referring to in his testimony. The trial court may properly question a witness when the facts become confused or a witness becomes confused. *People v Davis*, 216 Mich App 47, 49-50; 549 NW2d 1 (1996). In furtherance of this purpose, the trial court asked the witness if "judges and lawyers tend to talk funny sometimes?" This question did not single out defense counsel or denigrate him in any way. There is no indication that the court's questions or comments were intimidating, argumentative, prejudicial, unfair, partial, or deprived defendant of a fair trial. Instead, we conclude that the court's questions were relevant and impartial and did not amount to plain error affecting defendant's substantial rights.

III. Prosecutorial Misconduct

Defendant next argues that his right to a fair trial was violated by prosecutorial misconduct. We disagree. Once again, defendant failed to preserve this issue for appeal by a timely objection. Therefore, we review this issue for plain error affecting substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

During closing arguments, the prosecutor stated, "Mr. Brown is the accomplice. He's the accomplice, I believe." Defendant argues that these remarks amounted to prosecutorial misconduct that denied him a fair trial. During closing arguments, the prosecutor may appropriately argue from the evidence and inferences to be drawn therefrom that defendant committed the crime. *People v Stacy*, 193 Mich App 19, 37; 484 NW2d 675 (1992). However, the prosecutor may not use the prestige of his office in an attempt to persuade the jury to convict the defendant based on the prosecutor's belief in the defendant's guilt. *Id.*

We conclude that the prosecutor's comments about what he "believed" did not affect defendant's substantial rights or deny him a fair trial. The prosecutor's comment was immediately rectified by the trial court and the prosecutor. The court reminded the prosecutor that he could not tell the jury what he believed. The prosecutor acknowledged this and proceeded to argue that the evidence proved defendant's guilt. The court instructed the jury both in the preliminary instructions and in the final instructions that the arguments of counsel were not evidence. The prosecutor also reminded the jury that his arguments were not evidence. Accordingly, under these circumstances, defendant's rights were not affected by the prosecutor's isolated accidental comment.

Defendant also argues that his right to a fair trial was violated when, during closing arguments, the prosecution told the jury to acquit defendant of the assault with intent to commit murder, MCL 750.83, charge. Defendant argues that the prosecutor improperly tried to influence the jury when he stated, "This table is getting up and saying, he, the evidence doesn't show enough for him to be convicted of [assault with intent to commit murder]." Defendant contends that by this comment, the prosecutor effectively insinuated that, although he believed that the assault with intent to commit murder charge was lacking in evidence, the other charges were not. We disagree. There is no indication that the prosecutor's concession was a premeditated attempt to strengthen his credibility with the jury regarding the other charges. Although the prosecutor had earlier opposed defendant's motion for a directed verdict regarding the assault with intent to commit murder charge, it is reasonable to assume that, upon reflection, the prosecutor changed its strategy and decided to concede the weaker charge. The prosecution's use of the words "this table" was not an attempt to unfairly persuade the jury to convict defendant based on the prosecutor's belief that he was guilty. There is no indication that the prosecutor's remark was an attempt to influence the jury through the use of the prestige of his office. In fact, the prosecution's remark was an attempt to persuade the jury to *acquit* defendant of one of the charges. Therefore, we conclude that the prosecutor's comments did not amount to plain error affecting defendant's substantial rights.

IV. Sentencing

Defendant next argues that the sentencing guidelines were improperly scored and that the trial court failed to properly address the scoring errors. Because the offense occurred on January 25, 1999, the legislative sentencing guidelines, which were enacted pursuant to MCL 769.34, apply in this case. Defendant may challenge the scoring of the sentencing guidelines because he objected to the scoring at sentencing. MCR 6.429(C); *People v McGuffey*, 251 Mich App 155, 165-166; 649 NW2d 801 (2002). A sentencing court has discretion in determining the scoring of the sentencing guidelines, provided that the evidence on the record adequately supports the number of points scored. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A sentencing court's scoring decision will be upheld if there is any evidence to support it. *Id.*

Defendant first argues that the trial court erred in scoring twenty-five points for offense variable 1 (OV 1) (aggravated use of a weapon) because defendant was acquitted of the assault with intent to commit murder charge. Defendant contends that there was no evidence that he knew the carjacker had a gun or that he would shoot the gun. Under MCL 777.31, the trial court must score twenty-five points for OV 1 if a firearm was discharged at or toward a human being. In multiple offender cases, if one offender is assessed points for OV 1, all offenders must be assessed the same number of points. MCL 777.31(2)(b). Although the carjacker was never captured, he would have been assessed twenty-five points for OV 1 because there was evidence that he shot a firearm at one of the victims. Because this was a multiple offender case, the trial court correctly scored defendant twenty-five points for OV 1.

Defendant next argues that the trial court erred in scoring ten points for OV 9 (number of victims). Under MCL 777.39, the trial court must score ten points for OV 9 if there were between two and nine victims who were placed in danger of injury or loss of life. In this case, there were three people associated with the car that was carjacked. The carjacker ordered one of the victims out of the car while holding a gun in his hand. He then walked toward the other two victims with the gun. He pointed the gun at the back and then head of one of the victims. He then pointed the gun at the other victim. When the victims tried to run away, the carjacker fired at one of them. We conclude that the trial court correctly found that this evidence shows that there were at least two victims who were placed in danger of injury or death.

Finally, defendant argues that the trial court erred in scoring twenty-five points for OV 13 (continuing pattern of criminal behavior) because he was acquitted of the assault with intent to commit murder charge. Under MCL 777.43, the trial court must assess twenty-five points for OV 13 if the offense was part of a pattern of felonious criminal activity involving three or more crimes against a person. In scoring OV 13, the trial court must count all crimes within a five-year period, including the sentencing offense, *regardless of whether the offense resulted in a conviction*. MCL 777.43(2)(a) (emphasis added). In addressing defendant's challenge to the scoring of OV 13, the trial court noted that it tended to agree with defendant that the assault with intent to commit murder charge for which he was acquitted should not be counted against him, but explained that under the legislative guidelines, it was required to consider this charge. We conclude that the trial court erred in believing that it was required to consider the assault with intent to commit murder charge when sentencing defendant.

In *People v Ratkov (After Remand)*, 201 Mich App 123, 126; 505 NW2d 886 (1993), remanded 447 Mich 984 (1994), this Court explained that, in sentencing a defendant, the trial court may consider a charged offense for which the defendant was acquitted *if the trial court finds by a preponderance of the evidence that the defendant committed the crime*:

> Because the prosecution must prove controverted factual assertions underlying the scoring of the sentencing guidelines by a preponderance of the evidence rather than beyond a reasonable doubt, situations may arise wherein although the factfinder declined to find a fact proven beyond a reasonable doubt for purposes of conviction, the same fact may be found by a preponderance of the evidence for purposes of sentencing.

In the present case, it appears that the trial court believed that, because MCL 777.43(2)(a) requires the trial court to consider offenses that did not result in a conviction, it was required to

consider the assault with intent to commit murder charge in sentencing defendant. However, when sentencing a defendant, in order for the sentencing court to consider alleged conduct by a defendant for which he has not been found guilty, the court must find that the alleged conduct has been proven by a preponderance of the evidence. *Ratkov, supra* at 125-126. The trial court failed to make any findings in regard to whether defendant committed an assault with intent to commit murder. Accordingly, we remand for reconsideration of defendant's challenge to the scoring of OV 13.[1] If the court determines that the offense has not been shown by a preponderance of the evidence, the court shall consider whether to resentence defendant. If the court determines that the offense has been proved by a preponderance of the evidence, then OV 13 was properly scored and the trial court may deny resentencing. See *People v Chesebro*, 206 Mich App 468, 474; 522 NW2d 677 (1994).

We affirm defendant's convictions, but remand for further factfinding regarding sentencing in proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Bill Schuette

[1] The trial court's error is not harmless because it affects the ultimate legislative guidelines sentencing range. *Ratkov, supra* at 127.